Case No: 95813-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC,

Respondents,

v.

THE CITY OF SEATTLE,

Appellant.

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS FILED BY WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, TENANTS UNION OF WASHINGTON, FUTUREWISE, AND THE DISPLACEMENT COALITION

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INTRODUCTION

Amici curiae Washington State Association of Municipal Attorneys (WSAMA), Futurewise, Tenants Union of Washington, and the Displacement Coalition join in Seattle's argument for a wholesale reform of the ad-hoc regulatory takings test set forth by *Guimont v. Clarke*, 121 Wn.2d 586, 603-04, 854 P.2d 1 (1993) and *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 335-36, 787 P.2d 907 (1990). Such reform, however, is not warranted in this case because the trial court did not base its decision on the ad-hoc regulatory takings test. *Behrens v. Commercial Waterway Dist. No. 1 of King Cty.*, 107 Wash. 155, 166, 185 P. 628 (1919) (This Court will generally not pass upon constitutional questions that are not necessary to deciding the case at hand.).

The trial court concluded that Seattle's "First in Time" (FIT) rule must be invalidated because it violated Washington's Due Process, Takings, and Free Expression Clauses under several distinct theories: (1) the rule violated the "reasonably necessary" requirement of due process; (2) the rule violated the "not unduly oppressive" requirement of due process; (3) the rule effected a prohibited taking for private use; (4) the rule effected a regulatory taking by destroying a fundamental attribute of property; (5) the rule violated the "direct advancement" prong of the commercial speech test; and (6) the rule violated the "no more extensive" prong of the commercial

speech test. CP 511-20. Thus, because the proper remedy for those violations is invalidation, this Court would have to reverse on all six bases without addressing Seattle's claim that Washington's test for just compensation for ad-hoc regulatory takings should be reformed. *See*, *e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) ("[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.").

The City's amici argue that three of the five tests applied by the trial court are so contrary to decisions from the U.S. Supreme Court that each test should be stricken from Washington law.[1] They have it backward:

- Washington's "unduly oppressive" due process test mirrors the test established by *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894), which remains a valid due process test before the U.S. Supreme Court. *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962) ("The classic statement of the rule in Lawton [. . .], is still valid today."); *Lingle*, 544 U.S. at 541 (favorably citing *Goldblatt* and *Lawton* as due process precedents); *Guimont*, 121 Wn.2d at 609 ("the *Lawton* formulation is still valid").

- Washington's prohibition against private takings is consistent with the U.S. Supreme Court's longstanding recognition that the Fifth Amendment forbids the government from taking one person's land "for the purpose of conferring a private benefit on

[1] Amici choose not to address the "reasonably necessary" due process test or the commercial speech test.

a particular private party." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005); *see also Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L. Ed. 206 (1878) (the "public use" requirement is a restriction on the exercise of eminent domain); *Calder v. Bull*, 3 U.S. 386, 388, 3 Dall. 386, 1 L. Ed. 648 (1798) (The government has no constitutional authority to "take[] property from A and give[ ] it to B.").

- And Washington's "fundamental attribute" takings test follows the test applied by the U.S. Supreme Court in *Hodel v. Irving*, 481 U.S. 704, 716-17, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987) (holding that a law restricting the transfer of property effected a taking because it destroyed a fundamental attribute of property ownership.).

Because each of these constitutional theories is directly supported by case law from the U.S. Supreme Court, the arguments raised by Seattle's amici are inapposite to *Orion Corp. v. State*, which holds that U.S. Supreme Court cases interpreting the Takings and Due Process Causes of the U.S. Constitution "set[] a minimum floor of protection, below which state law may not go." 109 Wn.2d 621, 652, 747 P.2d 1062 (1987).

Amicus Tenants Union of Washington takes no position on the law applied by the trial court below, opting instead to re-argue the merits of the court's "reasonably necessary" and "unduly oppressive" inquiries. Its attempt to do so, however, is unavailing where the City chose not to appeal from the trial court's conclusion that the FIT rule is "an unreasonable means of pursuing anti-discrimination." CP 516. That uncontested conclusion is

sufficient to establish a due process violation. Thus, the trial court's well-reasoned decision should be affirmed.

ARGUMENT AND AUTHORITIES

I

THE TRIAL COURT'S CONCLUSION THAT THE FIT RULE IMPINGED ON A FUNDAMENTAL ATTRIBUTE OF PROPERTY IS CONSISTENT WITH STATE AND FEDERAL LAW

Seattle's amici ask this Court to abandon the heightened scrutiny "unduly oppressive" test applicable to regulations that impinge on a fundamental property interest, arguing that a property deprivation should instead be subject to minimal, rational basis scrutiny. But, in making this argument, amici fail to acknowledge that the degree of scrutiny applicable in each case turns on "the nature of the right involved." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006); *see also Turner v. Rogers,* 564 U.S. 431, 445, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011) (The level of review is determined based on "the importance of the interest at stake."). This glaring omission leads amici to cite cases that apply rational basis scrutiny, without identifying the nature of the rights at issue, rendering their arguments baseless. *See*, *e.g.*, Futurewise Br. at 14 (citing cases involving business regulations prohibiting oil producers from operating service stations and limiting the business of debt). Rational basis scrutiny is inapplicable and inappropriate in cases involving property rights.

Neither the City nor its amici directly challenge the trial court's conclusion that the FIT rule deprived the Yim plaintiffs of a fundamental property right. *See* CP 514. Indeed, they cannot credibly do so where this Court has consistently held that the right to freely alienate one's property for lawful purposes is a fundamental right and is fully protected by both the Due Process and Takings Clauses of the Washington Constitution. *See State v. Moore*, 7 Wash. 173, 175, 34 P. 461 (1893) ("The right to alienate property is essential to its use and enjoyment, as well as the right to acquire it, and both are constitutional rights."); *see also Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000) (Landowners have a constitutionally protected and fundamental right to alienate their property to whom they choose, at a price they choose.); *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 613-14, 124 P.3d 324 (2005) (recognizing a fundamental right to sell one's property to persons of one's choice); *State Farm Fire & Cas. Co. v. English Cove Ass'n, Inc.*, 121 Wn. App. 358, 365, 88 P.3d 986 (2004) (Ownership of property includes the right to "sell or otherwise dispose of property as one chooses.").

Nor can the amici claim that Washington's treatment of property rights is less protective than federal law where the U.S. Supreme Court has also recognized that the right to "dispose of [property] for lawful purposes"

is an "essential attribute[] of property." *Terrace v. Thompson*, 263 U.S. 197, 215, 44 S. Ct. 15, 68 L. Ed. 255 (1923); *see also Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 191-92, 57 S. Ct. 139, 81 L. Ed. 109 (1936) (The right to sell one's property "is within the protection of the Fifth and Fourteenth Amendments."); *Holden v. Hardy*, 169 U.S. 366, 391, 18 S. Ct. 383, 42 L. Ed. 780 (1898) (A law that deprives persons of the right to sell or acquire property would be "obnoxious" to due process.); *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 664, 15 S. Ct. 738, 740, 39 L. Ed. 848 (1895) ("[T]he right to sell it as an essential incident of such ownership.").

The failure by the City and its amici to acknowledge this caselaw is fatal to the argument that property rights are due only minimal protection. Indeed, the U.S. Supreme Court confirmed that the right to sell one's property to the person of his or her choice is a fundamental element of property in *Buchanan v. Warley*, 245 U.S. 60, 80, 82, 38 S. Ct. 16, 62 L. Ed. 149 (1917). There, the Court held that a Kansas law that prohibited a white property owner from selling real property to an African American was "in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law." *Id.* at 82. *Buchanan* contains three conclusions of critical importance to this case. First, *Buchanan* focused its

inquiry on whether the law violated the owner's right to sell his property to the person of his choice, asking whether "a white man [may] be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?" *Id*. at 78. Second, the Court held that the effect of the law was not merely a regulation on business (as Seattle and its amici impliedly suggest through their citation to cases involving the regulation of business practices), "but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character it was void as being opposed to the due process clause of the Constitution." *Id*. at 80. And third, the Court admonished that "the solution to the problems growing out of race relations 'cannot be promoted by depriving citizens of their constitutional rights and privileges.'"[2] *Bell v. State of Md.*, 378 U.S. 226, 311, 84 S. Ct. 1814, 12 L. Ed. 2d 822 (1964) (quoting *Buchanan*, 245 U.S. at 80-81); *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 2605, 192 L. Ed. 2d 609

[2] That admonishment is particularly appropriate here, where the City and the Tenants Union argue that the need to guard against the bare possibility that a landlord's tenant selection may be motivated by unconscious bias should trump the fundamental right of landlords to choose to whom they will lease property—even where the City's legislative record admits that the rule is overly broad and that there are less restrictive means available. *See* CP 106 (from a city council memo drafted by central staff: "Use of a first in time policy affects [] a landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class.").

(2015) ("The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.").

Any attempt by the City and its amici to dismiss the right of free alienation as a relic with no modern application is utterly without merit. The U.S. Supreme Court reaffirmed the fundamental nature of this right in *Horne v. Department of Agriculture*, __ U.S. __, 135 S. Ct. 2419, 2429, 192 L. Ed. 2d 388 (2015). There, raisin farmers challenged the constitutionality of a government marketing order requiring the farmers to set aside a percentage of their annual crop in order to prop up the market. *Id.* at 2424. The Court held that the order effected a taking—despite the fact that the government never actually took physical possession of any raisins—because the marketing order gave the government exclusive control over the use and/or sale of the set-aside raisins. *Id.* at 2428-29 ("[T]he growers lose any right to control their disposition."). Thus, *Horne* held that "a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking." *Id*. at 2430.

The trial court's conclusion that the FIT rule appropriated a fundamental attribute of property is consistent with long-settled state law, which provides at least the same protection as federal law. *See* CP 514. In

this circumstance, it is the duty of the Court to ensure that this settled right receives full constitutional protection. *See* Wash. Const. art. IV, § 28; *Eilers Music House v. Ritner*, 88 Wash. 218, 224, 154 P. 787 (1916) (Where the Supreme Court "announced a rule of property, and property rights have become fixed and determined thereunder, . . . the doctrine of stare decisis demands it be followed, except as otherwise determined [by an act of legislation]."); *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 735, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (J. Kennedy, concurring) (A court's power does not include the ability "to eliminate or change established property rights."). The amici's failure to acknowledge this large body of binding case law is fatal to their argument for minimal scrutiny.

II

THE TRIAL COURT'S RESOLUTION OF YIM'S DUE PROCESS CLAIMS IS CONSISTENT WITH STATE AND FEDERAL LAW

The trial court's resolution of Yim's due process claim faithfully applied state due process law, which provides a level of protection that is consistent with U.S. Supreme Court caselaw.[3] CP 515-16. Under this Court's longstanding precedent, a regulation that impinges on a property

[3] To avoid unnecessary repetition, Yim requests this this Court take notice of the briefs filed in the related case, *Yim v. City of Seattle*, No. 96817-9 (*Yim II*), which discuss at length the "unduly oppressive" due process test.

interest must undergo a three-part test: (1) whether the public purpose is legitimate; (2) whether the regulation uses a means reasonably necessary to achieving that purpose; and (3) whether the regulation is unduly oppressive on the landowner. *See Guimont*, 121 Wn.2d at 609; *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21, 829 P.2d 765 (1992); *Presbytery*, 114 Wn.2d at 330. This test is based on the standards set out by the U.S. Supreme Court in *Goldblatt* and *Lawton*, which hold that a regulation burdening a fundamental right in property must be "reasonably necessary for the accomplishment of the [public] purpose, and not unduly oppressive upon individuals" to satisfy substantive due process. *Goldblatt*, 369 U.S. at 594 (quoting *Lawton*, 152 U.S. at 137).

Applying this test, the trial court concluded that the City's anti-discrimination purpose satisfied the "public purpose" prong of the due process inquiry, but the City could not satisfy the remaining two factors. CP 515-17. First, the trial court held that the FIT rule was not "reasonably necessary" to achieve Seattle's antidiscrimination interest because it exceeded basic limits on the police power. *Id.* at 516. "The principle that government can eliminate ordinary discretion because of the possibility that some people may have unconscious biases has no limiting principle—it would expand the police power beyond reasonable bounds." *Id.* at 516. The FIT rule, because of its sweeping scope, limited the exercise of landlords'

fundamental rights "beyond what is necessary to provide for the public welfare." *Id.* (citing *Ralph v. Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949)). And second, the trial court concluded that "the FIT rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias." CP 517. The City's amici do not address the substance of those conclusions; instead, they claim that the "reasonably necessary" and "unduly oppressive" prongs (*i.e.*, the heightened scrutiny portion of the due process test) conflict with case law from the U.S. Supreme Court and should be stricken. They are wrong.

A. Washington's "Reasonably Necessary" Inquiry Is Consistent with Caselaw from the U.S. Supreme Court

The trial court's inquiry into whether the FIT rule was "reasonably necessary" to accomplish the City's anti-discrimination goal is one part of the heightened scrutiny inquiry required by U.S. Supreme Court caselaw, which has long-held that a restriction on property must be "reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community" in order to satisfy due process. *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 49, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977) (quoting *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721 (1914)); *see also Denver & R.G.R. Co. v. City & Cty. of Denver*, 250 U.S. 241, 244, 39 S. Ct. 450, 63 L. Ed. 958 (1919)

(A regulation of property must be "reasonably necessary to secure the public safety."). Inherent in that inquiry is the question whether the restriction is "no broader than 'reasonably necessary' under the circumstances." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 700, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) (discussing due process in the context of monetary penalties); *see also Zemel v. Rusk*, 381 U.S. 1, 14, 85 S. Ct. 1271, 1279, 14 L. Ed. 2d 179 (1965) ("The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction."). The failure by the City and its amici to acknowledge this long-settled standard renders their arguments against the "reasonably necessary" inquiry baseless.

B. Washington's "Unduly Oppressive" Test is Consistent with Long-Settled U.S. Supreme Court Precedent

The City's amici do not contest that this Court and the U.S. Supreme Court have long-held that a regulation may violate due process if it is unduly oppressive of an individual's property rights. Instead, they simply repeat the City's claim that the U.S. Supreme Court was mistaken when it adopted a heightened scrutiny inquiry, and that this Court was therefore wrong to adopt the test. *See*, *e.g.*, WSAMA Br. at 3-5. They are wrong. Like the City, the amici purposefully limit their analysis to one single decision—*Lawton* (1894)—in an attempt to make the "unduly oppressive" inquiry appear to

be both isolated from the Court's larger body of due process caselaw and temporally related to the Court's oft-maligned decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). This strategy of omission, however, overlooks the fact that the "unduly oppressive" inquiry has always been an element of due process and continues to animate the U.S. Supreme Court's due process case law in a variety of contexts.[4]

Substantive due process is grounded in the principle that government lacks the authority to enact laws that unnecessarily or oppressively deprive individuals of rights expressly secured by the Constitution. *See*, *e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 289, 31 L. Ed. 205 (1887) ("Nor can [the government], in the exercise of the

[4] The unduly oppressive test is found throughout the U.S. Supreme Court's due process case law. *See*, *e.g.*, *Stogner v. California*, 539 U.S. 607, 653, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003) (due process protects against oppressive prosecution); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453-54, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (oppressive fines violate due process); *Heath v. Alabama*, 474 U.S. 82, 103, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985) (relentless prosecutorial action is unduly oppressive and violates due process); *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) (retroactive legislation may violate due process if it is harsh and oppressive); *Engle v. Isaac*, 456 U.S. 107, 133, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) (oppressive shifting of the burden of proof violates due process); *United States v. Marion*, 404 U.S. 307, 330, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971) (oppressive incarceration before trial violates due process); *Helvering v. City Bank Farmers Tr. Co.*, 296 U.S. 85, 90, 56 S. Ct. 70, 80 L. Ed. 62 (1935) (a harsh and oppressive tax may violate due process); *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S. Ct. 71, 64 L. Ed. 139 (1919) (a penalty will violate due process where it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"); *United States v. Lovasco*, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977) (oppressive delay violates the right to a speedy trial); *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491, 35 S. Ct. 886, 59 L. Ed. 1419 (1915) (an oppressive penalty will violate due process).

police power, enact laws that are unnecessary, and that will be oppressive to the citizen."). To enforce the line between lawful and unlawful governance, the U.S. Supreme Court has held that decisions restricting an owner's rights in property must "substantially advance a legitimate state interest." *Lingle*, 544 U.S. at 540-41; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) ("*Euclid* held that land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare.'"); *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S. Ct. 447, 72 L. Ed. 842 (1928) (A land-use restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926) (A land-use ordinance is unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

The City and its amici argue that the "unduly oppressive" inquiry has no place in the "substantially advances" formula set out by *Lingle*, *Nectow*, and *Euclid*, insisting that "substantially advances" is just another way of saying "rational basis." Again, they are wrong. The U.S. Supreme Court has repeatedly explained that the "substantially advances" standard

requires more than minimal rational basis scrutiny. It requires the government to show that the law is sufficiently tailored to achieve its stated public purpose and is appropriate in scope so as to not place undue burdens on individuals. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (due process protects property owners "from an unfair allocation of public burdens"). Thus, both this Court and the U.S. Supreme Court have explained that the "unduly oppressive" test is just one of the several ways for a property owner to show that a regulation violates due process under a heightened scrutiny standard.[5] *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733, 104 S.

[5] *See also*, *e.g.*, *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180 (9th Cir. 2012) (applying the unduly oppressive test to mobile-home zoning ordinances); *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) ("[T]here is a due process claim where a 'land use action lacks any substantial relation to the public health, safety, or general welfare.'") (quoting *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855-56 (9th Cir. 2007)); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) (applying the test to Seattle's housing preservation ordinance); *Guimont*, 121 Wn.2d 586 (1993) (striking down a mobile-home tenant relocation ordinance under the unduly oppressive test); *Presbytery*, 114 Wn.2d 320 (1990) (applying the test to a wetlands ordinance); *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986) (applying the test to an ordinance establishing the point at which development rights vested); *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982) (applying the unduly oppressive test to a temporary emergency zoning measure); *Cradduck v. Yakima County*, 166 Wn. App. 435, 271 P.3d 289 (2012) (applying the test to development restrictions in a floodplain ordinance); *Bayfield Resources Co. v. WWGMHB*, 158 Wn. App. 866, 244 P.3d 412 (2010) (applying the test to a critical areas ordinance); *Conner v. City of Seattle*, 153 Wn. App. 673, 223 P.3d 1201 (2009) (applying the test to a permit denial); *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006) (applying the test to a county comprehensive land use plan); *City of Seattle v. McCoy*, 101 Wn. App. 815, 4 P.3d 159 (2000) (applying the unduly oppressive test to a nuisance abatement action); *State ex rel. Rhodes v. Cook*, 72 Wn.2d 436, 439, 433 P.2d 677 (1967) (asking whether a restriction on a right was "unnecessary" to achieve a public goal); *City of Seattle v. Ford*, 144 Wash. 107, 115, 257 P. 243 (1927) (asking whether a restriction is "excessive" or would effect a de facto prohibition on a lawful activity).

Ct. 2709, 81 L. Ed. 2d 601 (1984); *Guimont*, 121 Wn.2d at 609, n.10 ("The 'unduly oppressive' analysis merely provides a structure for determining the overall reasonableness of the means used to achieve the regulation's public purpose."); *see also*, *e.g.*, *Helvering v. City Bank Farmers Tr. Co.*, 296 U.S. 85, 90, 56 S. Ct. 70, 80 L. Ed. 62 (1935) (a tax will violate due process if it is unnecessary or inappropriate to the proposed end, unreasonably harsh or oppressive, or arbitrary); *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 672 n.6, 946 P.2d 768 (1997) ("Shifting a public burden to private shoulders may also be unduly oppressive[.]").

The settled understanding that the "substantially advances" formula requires heightened scrutiny is fatal to the City and amici's claim that U.S. Supreme Court caselaw did not require the trial court to consider whether the FIT rule was "unduly oppressive" of individual rights when evaluating the due process claim. In truth, it is the City's argument that a law extinguishing a fundamental property right is subject only to minimal rational basis scrutiny that would force Washington into direct conflict with the U.S. Supreme Court. Such a result is forbidden by the Fourteenth Amendment. *Orion Corp. v. State*, 109 Wn.2d at 652; *see also State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) ("When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings."); *Tricon, Inc. v. King*

County, 60 Wn.2d 392, 394, 374 P.2d 174 (1962) (This Court is "bound to follow the decisions of the Supreme Court of the United States" on questions "involv[ing] the interpretation and application of the federal constitution."). Unless and until the U.S. Supreme Court reconsiders its due process case law as it pertains to property, this Court cannot adopt a less protective standard than the heightened scrutiny test set out by *Lingle*, 544 U.S. at 540-41, *Goldblatt*, 369 U.S. at 594, and *Lawton*, 152 U.S. at 137.

C. The Unduly Oppressive Inquiry Is Not a Throw-Back to *Lochner v. New York*

Because there is no basis in U.S. Supreme Court case law to challenge the continuing validity of *Goldblatt* and *Lawton*, amicus WSAMA simply repeats the City's claim that the U.S. Supreme Court's "unduly oppressive" test derives from the repudiated decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). WSAMA Br. at 3-5. That argument is contradicted by *Lochner* itself.

This case bears no resemblance to *Lochner*. At issue in *Lochner* was a New York law that limited the number of working hours for bakers. The majority opinion stood for the proposition that it was within the power of the courts to "strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony

with a particular school of thought."[6] *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955). In other words, *Lochner* authorized courts to substitute their own policy judgment for that of the legislature. That did not occur below. Instead, the trial court's decision was based on the unchallenged conclusion that "the FIT rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias." CP 517. On that basis alone, the City and WSAMA's *Lochner*-based argument should be rejected. But there is more.

Justice Harlan, writing in dissent in *Lochner*, relied on the Court's long-established "unduly oppressive" test to illustrate why the majority opinion was wrong. 198 U.S. at 66-72 (Harlan, J., dissenting). He explained that the "undue oppression" inquiry is immediately distinguishable from *Lochner*'s majority rule because the question whether a law is "arbitrary, oppressive, and unjust" can be made "without interfering with that large discretion which every legislative power has" in enacting laws. *Davidson v. City of New Orleans*, 96 U.S. 97, 107-08, 6 Otto 97, 24 L. Ed. 616 (1877);

[6] The U.S. Supreme Court rejected *Lochner* and similar cases because they allowed courts to invalidate laws based on a court's policy judgment that a law was "unwise or incompatible with some particular economic or social philosophy." *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *see also West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952) (recognizing demise of the *Lochner* line of cases).

see also Ballard v. Hunter, 204 U.S. 241, 255-56, 27 S. Ct. 261, 51 L. Ed. 461 (1907) (reiterating that the unduly oppressive test does not question legislative judgment). Thus, the "undue oppression" inquiry does not interfere with the legislature's discretion to enact a law where there is "room for debate and for an honest difference of opinion." *Lochner*, 198 U.S. at 72. On this point, Justice Harlan emphasized that *Lawton* (and similar cases) did not authorize the Court to interfere with such a good faith regulation of economic activity. *Id*. at 66. Instead, *Lawton* enforced the well-settled rule that there must be a "real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation," and the means must not be "unreasonable and extravagant." *Id*. at 69-70 (citing *Mugler*, 123 U.S. at 661; *Lawton*, 152 U.S. at 139). The legislature, he continued, "may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone[.]" *Id*. (citing *Davidson*, 96 U.S. 97; *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 1065, 30 L. Ed. 220 (1886)). And the government's police powers "cannot be put forward as an excuse for oppressive and unjust legislation." *Id*. at 66 (quoting *Lawton*, 152 U.S. at 136). The City and WSAMA's *Lochner*-based arguments are without merit and must be rejected.

D. The Importance of a Public Purpose Cannot Determine Whether a Law Complies with Due Process

The Tenants Union insists that the importance of the City's anti-discrimination goal, alone, should be sufficient to satisfy due process under any standard of review. Wrong. As stated above, this Court and the U.S. Supreme Court require that a regulation that impinges on a fundamental property interest be "reasonably necessary for the accomplishment of the [public] purpose." *Goldblatt*, 369 U.S. at 594 (quoting *Lawton*, 152 U.S. at 137); *Guimont*, 121 Wn.2d at 609. Thus, the legitimacy of the City's goals are not determinative of the inquiry:

> It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one. . . . But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

Bates v. City of Little Rock, 361 U.S. 516, 524-25, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960) (discussing the standard applicable to regulations impinging on the freedom of assembly—another fundamental right). Instead, courts must "evaluate . . . such things as the nature of the menace against which [the regulation] will protect, the availability and effectiveness of less drastic protective steps, and the loss which appellants will suffer from the

imposition of the ordinance." *Goldblatt*, 369 U.S. at 595; *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 584, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."). Because the amici do not challenge the trial court's conclusions that the FIT rule went "beyond what is necessary to provide for the public welfare" and "bypass[ed] less oppressive alternatives for addressing unconscious bias," (CP 516-17) the arguments advanced by the Tenants Union are baseless.

Even so, The Tenants Union wrongly argues that the FIT rule is necessary because (1) the rule makes it easier to prevent intentional discrimination; and (2) the rule roots out implicit bias in housing decisions. Neither argument justifies the radical approach adopted by the City.

The Tenants Union claims that the FIT rule fulfils an important purpose because unintentional discrimination is too difficult to enforce through the traditional means of individualized suspicion and proof. Tenants Union Br. at 13. Yet the Tenants Union undermines its own argument. The Tenants Union, for instance, does not hesitate to rely on fair housing testing data, which indicates—assuming the data is reliable—that instances of unconscious discrimination can be successfully identified and

investigated. *Id.* at 8-12. And the Tenants Union points out that one reason housing experts recommend a first-in-time approach is because otherwise landlords are likely to face a discrimination claim. *See id.* at 18 ("This is a recommended practice because landlords who . . . use 'gut instinct,' 'common sense' or a 'hunch' in denying applications will likely face valid discrimination complaints."). If discrimination claims are so difficult to investigate, why would this recommendation be valued as a means to protect against such claims? Hence, the Tenants Union's own allegations are contrary to the claim that anti-discrimination statutes are so difficult to enforce as to justify banning individual discretion in leasing decisions.

But even assuming that unintentional discrimination is difficult to enforce, such difficulty does not justify the decision to extinguish individual rights. Our legal order has long recognized this foundational precept in doctrines like the presumption of innocence. As William Blackstone famously put it: "[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." 4 William Blackstone, *Commentaries on the Laws of England* 352 (1768). The challenges of enforcing a law are hardly unique to discrimination. Laws that prohibit texting while driving, for instance, pose serious enforcement problems, but that cannot justify relieving the government of its burden of proof. *See, e.g.*, Kathryn Varn, *Officers welcome new texting-while-driving ban but see*

challenges enforcing it, Tampa Bay Times (May 13, 2019).[7] Hence, the Tenants Union's concern regarding difficulty of enforcement does not support stripping landlords of recognized rights. A free society has higher values than perfect enforcement.

The Tenants Union's concerns regarding implicit bias also fail to support the FIT rule. The Tenants Union cites research claiming that implicit bias is a pervasive cognitive phenomenon. But the Tenants Union fails to note scientific evidence in the record concluding that implicit bias can be unlearned and mitigated. CP 236-37. Indeed, none of the research in the record recommends anything like a FIT rule; instead, the research recommends training, ad campaigns, and other means of helping individuals combat and overcome their own biases. *Id.* at 225, 233-34.

Indeed, the Tenants Union's own claims regarding implicit bias demonstrate that the FIT rule is a perilous response to this problem. According to the Tenants Union, implicit bias is a normal cognitive phenomenon that arises in every walk of life. *See* Tenants Union Br. at 6. Hence, if the FIT rule is an acceptable legislative response, then the scope of the police power would have no horizon. For example, the research in the record explores implicit bias in settings like criminal justice, health care,

[7] *Available at* https://www.tampabay.com/news/publicsafety/officers-welcome-new-texting-while-driving-ban-but-see-challenges-enforcing-it-20190513/.

employment, education, and housing. CP at 194. The research summarizes findings, for instance, about implicit bias in hiring decisions. *Id.* at 222. Would the City's approach to housing also allow a government to force employers to hire the first qualified applicant and prohibit a personal interview? As another example, the record evidence cites findings that Asian Americans are more likely to die from cancer than other groups, yet doctors are less likely to recommend cancer screening for Asian-American patients. *Id.* at 215. Could regulators therefore require physicians to make cancer-screening decisions based on standardized, uniform criteria rather than individualized care? If removing discretion is an acceptable government response to the mere possibility of implicit bias, then a government's ability to control private choice in virtually any context appears limitless.

But, in fact, the case law cited by the Tenants Union points to a more measured response. The Tenants Union cites, for instance, to *State v. Saintcalle*, where this Court recognized that implicit bias is a real problem in jury selection. 178 Wn.2d 34, 46-48, 309 P.3d 326 (2013) (*abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017)). While the Court acknowledged that implicit bias can often infect peremptory challenges, this Court opted *not* to do away with peremptory challenges entirely, which would have been analogous to the City's FIT

legislation in the housing context. Instead, the Court chose to make moderate adjustments to the test for analyzing discriminatory peremptory strikes. *See id.* at 53.[8] Washington General Rule 37, also cited by the Tenants Union, represents a similar middle road that retains peremptory challenges but institutes rules for limiting bias. *See* GR 37. Such moderation is especially vital where prohibiting a discretionary process implicates a fundamental right, as is the case here.

In short, while research indicates that implicit bias can influence decision-making in an array of contexts, the Tenants Union leaps to an extreme and punitive response, ignoring record evidence suggesting the viability of more moderate approaches. Thus, they cannot rebut the trial court's conclusion that the FIT rule went "beyond what is necessary to provide for the public welfare" and "bypass[ed] less oppressive alternatives for addressing unconscious bias." CP 516-17.

III

THE TRIAL COURT'S RESOLUTION OF YIM'S TAKINGS CLAIMS WAS CONSISTENT WITH STATE AND FEDERAL LAW

The trial court's resolution of Yim's claim that the FIT rule effected a prohibited private taking faithfully applied state law, and is perfectly

[8] When given another opportunity to address discriminatory peremptory strikes, this Court again declined to jettison peremptory strikes despite the risk of bias. *See Erickson*, 188 Wn.2d 721.

consistent with federal takings law. CP 514-15. So, too, was the trial court's resolution of the claim based on the "fundamental attribute" test. *Id.* at 514. The City's amici, however, distort the law in an attempt to shoe-horn this case into the general ad-hoc regulatory taking test set forth by *Guimont*, 121 Wn.2d at 602-03—a test that was not argued below. It is only that irrelevant test that includes two distinct elements that are contrary to federal takings law. *See* Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 Wash. L. Rev. 125, 131-32 (2011). Thus, while the Yim plaintiffs agree that Washington's takings case law contains errors that should, in an appropriate case, be updated to comply with modern federal takings law, this is the wrong case for such an overhaul.

A. The Washington Takings Clause Forbids Private Takings, Without Limitation

The trial court's conclusion that the FIT rule effected a private taking is a faithful application of article I, section 16, of Washington's Constitution, which commands that "Private property shall not be taken for private use," without limitation or exception. Wash. Const. art. I, § 16; CP 515. This absolute prohibition is so clear that Seattle took no position on Yim's private takings claim on summary judgment. CP 409 (arguing only that a decision in favor of the City on Yim's "fundamental attribute" claim would render the private takings claim "superfluous"). And the City has not

contested the trial court's conclusion that the FIT rule transferred a valuable property right to private persons in its pleadings to this Court. Opening Br. at 53-54; Reply Br. at 21. Instead, the City and its amici argue that the Private Use Clause does not directly apply to regulations that compel a private taking. *See* Futurewise Br. at 15-18. They are wrong.

There is nothing in the language of article I, section 16, that limits its application to certain types of government action. *Duke v. Johnson*, 123 Wash. 43, 53, 211 P. 710 (1923) ("[I]t is the duty of the court to . . . interpret the provisions of the Constitution as to carry [their] purpose into effect."). Thus, this Court has invalidated regulatory restrictions under the Private Use Clause. *See Manufactured Housing Communities of Wash. v. State*, 142 Wn.2d at 357. The U.S. Supreme Court also holds regulations subject to the Federal Constitution's less-protective Public Use Clause. *See*, *e.g.*, *Horne*, 135 S. Ct. at 2433 (noting that, to the extent the government's marketing order also violated the public use clause, the proper remedy is invalidation, not just compensation); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231-32, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) (A rule requiring lawyers to hold client funds in an IOLTA account must satisfy the Fifth Amendment's public use requirement); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984) (provisions of the state's eminent domain statute defining "public use" must satisfy the Public

Use Clause); *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 77-78, 57 S. Ct. 364, 81 L. Ed. 510 (1937) (invalidating statute requiring owners of pipe lines to allow other gas companies to use their pipe lines). The failure by the City and its amici to acknowledge this caselaw is fatal to the claim that regulatory actions are exempt from the prohibition against private takings.

Amici's alternative arguments are similarly baseless. Futurewise's claim that the prohibition against private takings is too difficult for courts to resolve in the context of land-use regulation finds no support in this Court's case law.[9] *Manufactured Housing*, 142 Wn.2d at 357; *see also State ex rel. Washington State Convention & Trader Ctr. v. Evans*, 136 Wn.2d at 817. Futurewise's discussion of the "incidental private use" inquiry is irrelevant and improper because Seattle did not raise this defense below and does not assert it on appeal. RAP 2.5(a).

[9] Futurewise cannot muster a single citation supporting that claim, relying instead on a case in which the court of appeals reviewed a non-constitutional, substantial evidence challenge to a conditional use permit that did not involve a claim that the permit transferred property rights to other private owners. Futurewise Br. at 16-18 (discussing *J.L. Storedahl & Sons, Inc. v. Cowlitz Cty*., 125 Wn. App. 1, 10-12, 103 P.3d 802 (2004)). In truth, Washington courts regularly adjudicate the private use question in a variety of complex contexts. *See State ex rel. Washington State Convention & Trader Ctr. v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 549 (1998); *In re City of Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981); *Town of Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966); *Chandler v. City of Seattle*, 80 Wash. 154, 159, 141 P. 331 (1914); *City of Tacoma v. Nisqually Power Co*., 57 Wash. 420, 428, 107 P. 199 (1910).

The Displacement Coalition, too, attempts to insert an improper argument into this appeal by arguing that the trial court, in concluding that the FIT rule violated the Private Use Clause, failed to engage in the analysis required by *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (establishing a test for determining when the Washington Constitution provides greater protection than its federal counterpart). In truth, neither party addressed *Gunwall* in their summary judgment pleadings because such an analysis was not necessary. *Manufactured Housing* held that Washington's Private Use Clause is more protective than the Public Use Clause of the U.S. Constitution after engaging in a full *Gunwall* analysis. *See Manufactured Housing*, 142 Wn.2d at 356-61; *see also id*. at 374-75 (Concluding that, unlike the Fifth Amendment, article I, section 16, of the Washington Constitution contains an "absolute prohibition against taking private property solely for private use" which is "not conditioned on payment of compensation."); *see also* Manufactured Housing Br. at 7-11. In this circumstance, "a *Gunwall* analysis is no longer necessary."[10] *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009); *see also State v. Ramos*, 187 Wn.2d 420, 453-54, 387 P.3d 650 (2017) (Once the Court established

[10] This Court does not require a new *Gunwall* analysis each time a state constitutional provision in invoked. *Ramos*, 187 Wn.2d at 454. Instead, this Court simply requires plaintiffs to explain how the state Constitution is applicable to their claims. *Id*. (criticizing the petitioner for "not address[ing] the factors for determining whether a sentence independently violates the Washington Constitution").

that the State Constitution is more protective, "this established principle requires no analysis under *Gunwall*.") (internal quotation marks and alterations omitted); *State v. Athan*, 160 Wn.2d 354, 364, 158 P.3d 27 (2007) (same); *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) (same).

This Court can and should affirm the trial court's decision on the basis of the trial court's unchallenged conclusion that the FIT rule effected a private taking. *Lingle*, 544 U.S. at 543 (Because the Takings Clause forbids private takings, this "inquiry is logically prior to and distinct from the question whether a regulation effects [an uncompensated] taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."). This unchallenged conclusion obviates the need to address the claim that *Guimont's* ad-hoc regulatory taking test conflicts with *Penn Central* because, "if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement . . . —that is the end of the inquiry."[11] *Id.*; *see also e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 n.*, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) (O'Connor, J., concurring) ("The *first* question is whether the enactment or application of a regulation constitutes a valid

[11] *Behrens v. Commercial Waterway Dist. No. 1 of King Cty.*, 107 Wash. 155, 166, 185 P. 628 (1919) (The Supreme Court will generally not pass upon constitutional questions that are not necessary to deciding the case.).

exercise of the police power. The *next* question is whether the State must compensate a property owner for a diminution in value effected by the State's exercise of its police power.") (emphasis added); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (holding that while the "public use" requirement of the Takings Clause may be "coterminous" with the scope of a sovereign's police powers, the "just compensation" requirement must also independently be satisfied when a taking occurs).

B. The Fundamental Attribute Test Is Rooted in U.S. Supreme Court Case Law

Amici's argument against Washington's "fundamental attribute" test repeats Seattle's erroneous claim that "[f]ederal takings law does not recognize as a takings claim that a regulation destroys a fundamental attribute of property ownership other than a physical occupation." Futurewise Br. at 5; Seattle Reply Br. at 18 (same); Seattle Op. Br. at 44 (claiming that the test derived from an incorrect analysis in a law review article). And from that false premise, the amici argue that (1) the trial court should have analyzed Yim's "fundamental attribute" claim under *Guimont*'s ad-hoc, multi-factorial test, which (2) would have brought the case into conflict with the federal test for ad-hoc regulatory takings set out in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). *See* Futurewise Br. 7, 9-10; Displacement

Coalition Br. 7-10. Amici then insist (without explanation) that, because the trial court did not analyze Yim's takings claims under *Guimont*'s ad-hoc regulatory takings test (which they claim would conflict with *Penn Central*), the decision somehow falls below the standard of protection guaranteed by the U.S. Supreme Court.

That highly attenuated argument fails at the first hurdle. Washington's "fundamental attribute" test is consistent with the rule set out by *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (cited favorably by *Lingle*, 544 U.S. at 539), and *Hodel*, 481 U.S. at 716-17. In *Kaiser Aetna*, the U.S. government sued a marina owner to enjoin him from excluding the public from accessing and crossing over the marina property upon the theory that the owner made the property public by deepening a canal that connected the property to the ocean. *Id*. at 167-68. The U.S. Supreme Court held that, while the government was authorized to impose a servitude on the property, it cannot extinguish a "fundamental element of property" without payment of just compensation. *Id*. at 179.

While *Kaiser Aetna* is most frequently cited for the proposition that the right to exclude is a fundamental attribute of property ownership, the U.S. Supreme Court has also cited the case for the broader rule that there are certain fundamental rights in property that cannot be taken without

compensation. *Id*. Thus, in *Hodel*, the Court concluded that a federal law forbidding owners of allotted parcels from transferring the property by devise or descent effected a taking because it deprived the owner of a fundamental attribute of ownership. 481 U.S. at 716-17 (equating the right to pass on property with the right to exclude) (citing *Kaiser Aetna*, 444 U.S. at 176); *see also Horne*, 135 S. Ct. at 2429 (an order depriving an owner of his right to control and dispose of property effects a taking); *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 191 Cal. Rptr. 47, 58 (Ct. App. 1983) (holding that an ordinance requiring mobile home park owners to offer tenants a right of first refusal constituted "an outright abrogation of well-recognized property rights . . ." and extinguished a fundamental attribute of ownership in violation of the U.S. Constitution).

The failure by the City and its amici to acknowledge this U.S. Supreme Court case law undermines its claim that Washington's "fundamental attribute" inquiry is contrary to the multi-factorial regulatory takings test established by *Penn Central*. Properly understood, the Federal "fundamental attribute" test falls into a line of cases in which the U.S. Supreme Court has held that the force of a single factor in the takings inquiry can be so overwhelming that it will determine whether a taking has occurred without regard to other considerations. *Compare Kaiser Aetna*, 444 U.S. at 176, and *Hodel*, 481 U.S. at 716-17, *with Ruckelshaus v.*

Monsanto Co., 467 U.S. 986, 1005-06, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984) (upholding a law that forced a pesticide company to disclose trade secrets (protected as property) because its lack of reasonable investment-backed expectations was so overwhelming), and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (upholding limitations on a mall owner's right to exclude certain speakers from the property upon the conclusion that the right to exclude was not "essential to the use or economic value of the[] property"). The City and its amici ignore this well-established rule. They cannot, therefore, meet their burden of showing that the trial court's application of the "fundamental attribute" test was contrary to federal takings law.

IV

LINGLE DEMANDS CHANGES TO STATE TAKINGS LAW IN A MANNER WHOLLY UNRELATED TO THIS CASE

Seattle and its amici are correct insofar as they argue that the U.S. Supreme Court clarified its regulatory takings and substantive due process case law in *Lingle*. They are also correct in asserting that this Court has yet to incorporate those clarifications into State law, leaving in place certain conflicts. *See*, *e.g.*, *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. at 621 (Becker, J., dissenting) (noting that the "substantially advances" test is not properly part of the takings inquiry after *Lingle*). The City and its amici are incorrect, however, in arguing that *Lingle* has any effect on the

"private taking" and "fundamental attribute" takings tests applied by the trial court below.

The sole question presented in *Lingle* was "whether the 'substantially advances' formula announced in *Agins* [*v. City of Tiburon,* 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)] is an appropriate test for determining whether a regulation effects a Fifth Amendment taking." *Lingle*, 544 U.S. at 532. The Court answered that question in the negative, concluding that the "substantially advances" test is properly applied in a substantive due process case, but not as part of a takings inquiry. *Id*. at 540-41, 545, 548. In reaching this decision, *Lingle* "emphasize[d] that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require us to disturb any of our prior holdings." *Id*. at 545.

The City and its amici, nonetheless, claim that *Lingle* should be read to have impliedly overruled the "private taking" and "fundamental attribute" takings tests when it explained that regulatory takings are typically adjudicated under one of three tests:

1) "[W]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)).

2) "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

3) "Outside these two relatively narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)." *Lingle*, 544 U.S. at 538. That multi-factorial inquiry requires court to consider "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' In addition, the 'character of the governmental action' . . . may be relevant in discerning whether a taking has occurred." *Lingle*, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124).

The City and its amici are wrong that *Lingle* impliedly overruled anything.

The "first rule of case law as well as statutory interpretation is: Read on." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). And when *Lingle* is read in its entirety, it is apparent that the Court did not intend to disturb its prior decisions (just as the Court said). *Id*., 544 U.S. at 545. Indeed, while providing an overview of takings law, the Court also favorably cited cases establishing several takings theories not discussed at length, including inverse condemnation,[12] the fundamental attribute inquiry,[13] private takings,[14] and unconstitutional

[12] *Id*. at 537 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670, 95 L. Ed. 809 (1951), and *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945)).
[13] *Id*. at 539 (citing *Kaiser Aetna*, 444 U.S. at 176).
[14] *Id*. at 543 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)).

conditions claims.[15] The Court also cited decisions establishing the unduly oppressive due process test.[16] And more recently, the Court referred to the *Loretto*, *Lucas*, and *Penn Central* tests as fundamental "guides" in the takings inquiry, while cautioning that, "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area." *Arkansas Game & Fish*, 568 U.S. at 31. There is no basis in U.S. Supreme Court case law to disturb the settled "private taking" and "fundamental attribute" tests.

Even so, this is not the case in which to overhaul Washington's ad-hoc regulatory takings test. The City and its amici agree that the trial court did not apply the *Guimont* regulatory takings test below and did not, therefore, apply either of the tests that Seattle and its amici insist are in conflict with *Penn Central*. *See Guimont*, 121 Wn.2d at 603-04 (asking (1) "whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area, or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit;" and

[15] *Id*. at 546-47 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-832, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)).
[16] *Id*. at 541 (citing *Goldblatt*, 369 U.S. 590, and *Lawton*, 152 U.S. at 137).

(2) "whether the regulation substantially advances a legitimate state interest. If it does not, the regulation is a taking"). While a clarification of the law is most certainly in the public's interest, there has been no shortage of cases that actually raise the questions that Seattle asks this Court to address. *See*, *e.g.*, *Gray Businesses*, 130 Wn. App. 600, *rev. denied,* 158 Wn.2d 1024, 149 P.3d 379 (2006) (denying petition arguing that Washington's ad hoc regulatory takings test conflicts with *Penn Central*); *see also Common Sense All. v. Growth Mgmt. Hearings Bd.*, 189 Wn. App. 1026, 2015 WL 4730204 (2015), *rev. denied,* 184 Wn.2d 1038 (2016) (denying petition arguing that Washington's continuing application of the "substantially advances" test as part of the takings inquiry conflicts with *Lingle*); *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 760, 265 P.3d 207 (2011), *rev. denied,* 173 Wn.2d 1035, 277 P.3d 669 (2012) (denying petition asking the Court to clarify aspects of Washington's takings test due to a conflict with *Lingle*); *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd*., 160 Wn. App. 250, 273, 255 P.3d 696 (2011), *rev. denied,* 171 Wn.2d 1030, 257 P.3d 662 (2011) (denying a petition that alleged that the lower court's reliance on the "substantially advances" alone test to dismiss a claim repudiated on the Takings Clause conflicted with *Lingle*). The Yim plaintiffs agree that this Court should revisit its ad-hoc regulatory takings test at the first appropriate opportunity. This, however, is

not the proper case in which to do so. *Behrens v. Commercial Waterway Dist. No. 1 of King Cty.*, 107 Wash. 155, 166, 185 P. 628 (1919) (declining to pass upon constitutional question where it is not necessary to determine the case).

V

AMICI FAIL TO OVERCOME THE FORCE OF STARE DECISIS

This Court will only abandon prior precedent upon a "clear showing that an established rule is incorrect and harmful." *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Stare decisis applies with special force where, as here, the precedent in question establishes a rule of property. *See United States v. Milner*, 583 F.3d 1174, 1184 (9th Cir. 2009). While the parties have argued at length regarding whether the precedent at issue in this case is correct or not, neither the City nor its amici have made even a plausible argument regarding harm.

Like the City, Futurewise (the only amicus to discuss stare decisis) fails to demonstrate any harm resulting from the actual precedents at issue in this case—precedents establishing "private takings," the "fundamental attribute" test, and the "unduly oppressive" or "substantially advances" test. Futurewise recognizes that stare decisis requires that this Court's cases can

only be overturned upon a clear showing of both error and harm, yet Futurewise conflates the two in a transparent attempt to sidestep the harm requirement.[17]

For instance, Futurewise argues that the "fundamental attribute" test "is harmful because it unnecessarily complicates Washington takings law and can result in a regulation being found unconstitutional under Washington law, but not federal law, even though this Court purports to follow federal law." Futurewise Br. at 7. A failure to follow federal law while espousing to follow federal law—if accurate—would be an error, not a harm. Futurewise cannot dodge the harm requirement by folding it into the error analysis.

Futurewise's claim about unnecessary complexity is likewise an issue of error. Even if, however, this Court considered this to be an argument about harm, Futurewise's conclusory statement that the fundamental attribute test is too complex would not constitute a "clear showing" of harm. Indeed, that conclusory statement is false; the fundamental attribute test is *less* complex than the traditional *Penn Central* factors that Futurewise advocates for. The fundamental attribute test asks only if a fundamental attribute of property ownership has been

[17] This brief does not address Futurewise's stare decisis analysis with regard to legal precedents that have nothing to do with the case at bar, such as the harm prevention/benefit conferral dichotomy. *See* Futurewise Br. at 8-10.

extinguished—it requires no balancing or ad hoc consideration of a glut of confusing and undefined factors.[18] [19] *See Palazzolo v. Rhode Island*, 533 U.S. at 617 (The Court has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action

[18] Scholars from both sides of the property rights debate have criticized the *Penn Central* framework as being vague, impossible to apply in a consistent manner, and an invitation to judicial subjectivity. *Compare* Steven J. Eagle, *The Four-Factor Penn Central Regulatory Taking Test*, 118 Penn St. L. Rev. 601, 604 (2014) ("Furthermore, the complex and ad hoc approach that is at the heart of *Penn Central* has been sharply criticized as 'mask[ing] intellectual bankruptcy,' and as a 'strategy of insecurity.'") (footnotes omitted); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill Rts. J. 679, 681 (2005) ("*Penn Central* lacks doctrinal clarity because of its outright refusal to formulate the elements of a regulatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine."), *with* John D. Echeverria, *Is the Penn Central Three-Factor-Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Dig. 3, 11 (2000) (declaring that the *Penn Central* framework "is not supported by current Supreme Court precedent, invites unprincipled judicial decision making, conflicts with the language and original understanding of the takings clause, would confer unjust windfalls in many cases, and creates seemingly insurmountable problems in terms of defining an appropriate remedy"); *see also* Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 Wm. & Mary L. Rev. 995, 995 (1997) (describing *Penn Central* as an "ill fitting piece [ ] left over from other puzzles long ago forgotten and now deserving abandonment"); *see also* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 678 (2013) (surveying the divergent applications of the *Penn Central* factors among three federal circuits).

[19] Confusion regarding the *Penn Central* factors has tipped the scales of justice overwhelmingly in favor of the government. Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1, 7 (2017) ("government-defendants almost invariably prevail under *Penn Central*"). Indeed, empirical studies show that most courts do not engage in any sort of balancing of the *Penn Central* factors, and instead "almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings." James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 62 (2016); *see also* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Cir. B.J. 677, 687 (2013) (empirical study finding less than 10% of *Penn Central* claims in the First, Ninth, and Federal Circuits succeed at any level and only four out of 162 cases in the three appellate courts actually prevailed).

goes too far and effects a regulatory taking."); *Murr v. Wisconsin*, __ U.S. __, 137 S. Ct. 1933, 1942, 198 L. Ed. 2d 497 (2017) (the Court has largely refrained from elaborating on those "ad hoc" factors or explaining how the test is to be applied in order to preserve the flexibility necessary to respond to each case on its individual merits).

Futurewise also tries and fails to demonstrate any harm stemming from the "substantially advances" test. Once again, Futurewise's harm analysis is just a conclusory remark that the test asks courts to substitute their judgment for that of other government branches. Futurewise borrows a snippet of similar language from *Lingle*, and its argument is nothing more than a misreading of that case. *See* Futurewise Br. at 14; *Lingle*, 544 U.S. at 544. *Lingle* only rejected the "substantially advances" test "as a takings test," expressly recognizing that the test lives on in the due process context. *See id.*; *id.* at 540 ("We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."). Neither Futurewise nor any other party has shown this Court a single instance of clear harm flowing from the precedents at issue in this case.

CONCLUSION

For the reasons set forth above and in the briefing filed herein, the Yim plaintiffs respectfully request that this Court affirm the trial court's well-reasoned decision.

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Respectfully submitted,

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